

Litigating U.S. National Security Measures Utilizing Economic Tort Claims

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ABSTRACT

The decision to engage in commercial or contractual relations depends largely on information, which is sometimes sourced from competitors, raising the prospect of self-interested spread of false or recklessly unverified information. Competitors are incentivized to impute negative characteristics to business rivals such as claiming the rival's products or services are defective. False claims made by competitors may subject the competitor to suits for damages based on disparagement. In the context of the United States-China hegemonic rivalry, accusations relating to the competitor nation's corporate entities' allegedly defective product or service (e.g., a national security risk) might be motivated by legitimate perceptions of a national security threat or alternatively, driven by economic nationalism or protectionism. Falsely or recklessly alleging business entities are a national security risk may constitute the tort of commercial disparagement which allows injured parties to file claims for compensation for damages proximately caused by the disparaging statements. This paper seeks to contribute to the literature by raising the potential use of economic tort theory to litigate national security measures instituted by governments claiming a competitor nation's economic actors' products or services are defective, i.e., constitute a national security threat. Commercial disparagement claims may serve as a vehicle to strike a balance between legitimate security concerns and overreach. This paper breaks new ground as no existing literature exists regarding a commercial disparagement claim since in the past, national security was conceptualized as defense of borders and territorial integrity. Today, national security implicates economic, technological, and ideological power which are intertwined with commercial activities and led by corporations whose products and services are subject to disparaging statements. The topic is explored through the lens of a measure against a Chinese entity based upon an alleged national security threat and the Chinese business seeking damages using an economic tort theory to recover present and future losses caused by the allegedly disparaging statement.

We're dealing with an adversary, a competitor, in China stronger than the Soviet Union was in the 1940s, '50s, '60s, '70s and '80s. . . . Our companies and tech experts are competing on AI and biotech and quantum mathematics. . . . All those technological advances will lead to a new generation of military technology. Our two militaries are vying for military supremacy — who's going to be the

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most powerful in the most important, strategic part of the world, which is the Indo-Pacific.¹

I. INTRODUCTION

An era of hegemonic rivalry between the United States and China has commenced, proximately causing the derailment of the post-World War II global governance architecture and initiating a transformational big power rivalry.² While armed conflict remains integral in international affairs, as evinced by Russia's invasion of Ukraine, great power rivalry is no longer ensconced exclusively in strictly military terms.³ The U.S.-China hegemonic battle is not limited exclusively to "hard-core" armed conflict, but is rather an "unrestricted" struggle. This unrestricted conflict encompasses weakening an adversary by all means necessary, such as exploiting social media, leveraging emerging technologies, leveraging economic aid for influence, and even encouraging pharmaceutical abuse in an enemy nation.⁴

Traditionally, national security was primarily related to defending physical borders from invasion, i.e., preserving territorial integrity. Today, however, defending the national bastion encompasses not only military strength but

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Bill Gertz, *U.S. Engaged in 'Battle of Ideas' with Communist China, U.S. Ambassador Says*, WASHINGTON TIMES (Feb. 26, 2024).

2. This Article acknowledges China's stated position that it does not seek to displace the U.S. as the dominant global power. China's Paramount Leader, Xi Jinping, has stated, "China will never seek hegemony, expansion or sphere of influence." Keynote Address at CPC and World Political Parties Summit (July 7, 2021). However, world history and geo-strategic realism militate toward concluding that powerful sovereigns do endeavor (or eventually decide) to leverage structural power, project dominance, and seek regional if not global hegemony. China's regional if not global ambitions are manifestly clear, which in no way constitutes a critique of China. Inherently, and within human nature, any nation so enabled wants to rule the world. See Lutz-Christian Wolff, *Legal Responses to China's "Belt and Road" Initiative: Necessary, Possible or Pointless Exercise?*, 29 TRANSNATIONAL L. & CONTEMP. PROBS. 249, 256 (2020) ("It would, in fact, be naïve to believe that China is not pursuing its own geopolitical BRI goals."); Joel Slawotsky, *Crossing the Rubicon: Conceptualizing National Security to Vanquish Competition*, 2 L. SCI. 69, 76–77 (2023) (outlining Chinese stratagems to project Chinese influence and exercise dominion including Xi Jinping's call to Persian Gulf oil producers to price their oil in Renminbi rather than the U.S. Dollar).

3. In addition, EU Members are increasingly linking China's support of Russia to a national security threat. See, e.g., Sweden's 2024 National Security Strategy specifically highlighting China's alliance with Russia as a national security threat to Sweden. GOV'T OFF. OF SWED., NAT'L SEC. STRATEGY, at 19, <https://perma.cc/YM3D-9RKH> ("China's deepening partnership with Russia and indirect support for Russia's war of aggression against Ukraine contribute to the serious security situation in Europe. China has been moving in an increasingly totalitarian direction.").

4. Compare QIAO LIANG & WANG XIANGSUI, (UNRESTRICTED WARFARE) (1999) (People's Liberation Army Literature and Arts Publishing House) (arguing that war now encompasses the use of media, international law, culture, drugs, and various other methods leveraging economic, technological and ideological power as legitimate tools to undermine and weaken enemy nations), with COUNS. OF THE EUR. UNION, LEGIS. ACTS AND OTHER INSTRUMENTS, <https://perma.cc/Q8XX-YM4W> (defining war in the 1950s as involving implements such as rifles, bombs, tanks, explosives, aircraft, and electronic equipment). There is growing recognition that emerging technologies have dual-uses which are directly applicable to defense. See UNISYS, INTRA-COMMUNITY TRANSFERS OF DEFENCE PRODUCTS 11 (2005).

economic power; dominating frontier technologies like AI, robotics, algorithmic manipulation of social media, digital currencies and digital money institutions and exchanges, and globalized communication has raised the importance of ideological power. Sovereigns can influence elections, hack data, interfere with energy, finance, and communications, demoralize an enemy state through social media, and degrade an adversary through an array of non-military “weaponry.”

Even “soft-power” and notions of governance and values are considered a component of defending national security.

Some states seek to undermine this order and give effect to their revisionist notions of spheres of influence. They view human rights, civil liberties and democratic participation as a threat to their power. As part of hybrid strategies, they are increasingly engaging in targeted attacks on the freedom of other states, and are trying to interfere in political processes, public debate and elections in those states.⁵

Furthermore, all of the civilian power spheres, economic, technological, and ideological, have dual-uses and are therefore inextricably linked to military power.⁶

Significantly, large and strategic corporations constitute the leading global actors with respect to economic, technological, and ideological power, and are the primary entities which develop, innovate, and market these power levers. Due to both the capacity to facilitate creation of huge profitable economic sectors as well as their usefulness for military strength, frontier technologies in particular have become an increasingly important part of national security. The current era is also seeing a return to economic nationalism, industrial policy, and a recognition that private corporations are significant players in defending national interests as well as the potential use by governments to leverage domestic businesses as an “offensive weapon.”⁷ Accordingly, corporations constitute quintessential (if not paramount) national security assets and are inextricably intertwined with commercial conduct which focuses on power spheres associated with global dominance: economic, technological, and ideological strength.⁸

Illustrative of this phenomenon, the U.S.-China competition is closely linked to commercial conduct and, significantly, corporations are competing for market share and global dominance. From electric vehicles, mobile 5G, social media,

5. THE GERMAN FED. GOV'T, INTEGRATED SECURITY FOR GERMANY 23 (2023) <https://perma.cc/K2H5-GYTQ> [hereinafter GERMAN NATIONAL SECURITY STRATEGY].

6. The civilian power spheres also directly impact military power since economic heft empowers the building and maintaining of a powerful military, technologies are dual-use, and ideology can be used to de-moralize an adversary. See *infra* Part V C 1.

7. Rachel Brewster, *A New Global Corporate Regulatory Power?: Market Entry as the Basis for Prescriptive Jurisdiction*, 2023 UNIV. CHI. LEGAL F. 59, 60 (2024) (“We have entered an era where governments are embracing more unilateral tools to resist foreign economic influence and reinvigorating national industrial policies. While states may directly spar with each other, they are also seeking control over private firms and their engagement in other states’ economies.”).

8. See Joel Slawotsky, *The Fusion of Ideology, Technology and Economic Power: Implications of the Emerging United States National Security Conceptualization*, 20 CHINESE J. INT’L L. 3 (2021).

artificial intelligence, and biotechnology, nearly all industries and emerging technologies are led by corporations. Given the importance of corporations to the geo-economic paradigm, competitor States increasingly recognize the importance of corporations in investment and trade and the overall hegemonic struggle.⁹ Competitor nations are thus incentivized to engage in disparagement, i.e., to ascribe highly uncomplimentary descriptions or assert negative claims about their adversary's commercial businesses to decimate the enemy nation's corporations current and future commercial prospects.

Furthermore, the hegemonic rivalry incentivizes countries to increasingly resort to national-security-inspired measures in investment and trade, such as export bans, enhanced investment screening (both inbound and outbound), and Entity Lists,¹⁰ all of which significantly impact commercial relations.¹¹ National security-based measures in the United States are often accompanied by statements about a product or service constituting a serious national security threat, particularly relating to Chinese business entities. The Chinese response is to opine that the U.S. statements about the product or service are disparaging, unfair, and are attempts to use national security as a form of protectionism - an excuse for building competitor U.S. domestic corporations' business and commercial prospects and simultaneously damaging Chinese economic actors. For example, as discussed below, the United States has labeled Huawei as a dire security risk, alleging that Huawei's infrastructure contains a pathway to collect and transmit data to the Chinese Communist Party ("CCP" or "Party").¹² Huawei denies the claim and alleges that "competitive jealousy" is the precipitating factor in the accusations.¹³

This raises a question, if an economic actor is labeled a national security risk proximately causing economic loss, can that entity file a disparagement claim against the party claiming the business is a security threat?¹⁴ The issue is ripe and novel inasmuch as prior hegemonic rivalries were largely limited to military

9. Henrique Choer Moraes, *The Changing Logic of International Economic Law*, 7 UCLA J. INT'L L. & FOR. AFF. 115, 117-18 (2024) ("[E]conomic policies are increasingly guided by a whole set of different concerns. Instead of interdependence, trade liberalization, and market-orientation, more and more rules and government decisions are pursuing goals such as 'reduction of dependence,' resilience, autonomy, and even self-reliance, as illustrated by recent policies implemented in the United States, China, and the European Union (EU)").

10. See BIS Entity List, 15 C.F.R. Appendix Supplement No. 4 to Part 744—Entity List, <https://perma.cc/78ZN-TJRJ> (prevents entities from accessing U.S.-origin products or technology).

11. Mackenzie Hawkins, *US Weighs Sanctioning Huawei's Secretive Chinese Chip Network*, BLOOMBERG (Mar. 20, 2024), ("The Biden administration is considering blacklisting a number of Chinese semiconductor firms linked to Huawei Technologies Co.").

12. The use of commercial disparagement in the context of national security is novel and there is a dearth of existing literature on the topic. The issue, by definition, also requires a somewhat interdisciplinary approach given that national security encompasses foreign policy and international relations. Commercial disparagement litigation may serve as a vehicle to litigate national security measures, creating a balance between legitimate security concerns and overreach.

13. See *Huawei: US Scared We Are Too Competitive*, BBC (Feb. 27, 2018), <https://perma.cc/9MEB-KKMA>.

14. States have sovereign immunity from tort claims, although the immunity may be waived in the context of international investment law.

conflict while today's U.S.-China rivalry is intricately related to commercial activities conducted by each rival's corporations.

This article discusses commercial disparagement in an age of hegemonic competition through the prism of government statements asserted to justify the imposition of national security-based measures. While challenges to national security-based measures have traditionally focused in U.S. domestic courts on constitutional law, administrative law, and in international forums on investment treaty claims, litigating economic torts claims remains a largely under-explored legal issue.¹⁵ This article contributes to the literature by raising the issue, and the potential difficulties to litigate disparagement claims because of sovereign immunity. While this article focuses on U.S. domestic courts, economic disparagement claims might also serve as a pathway to resolving disputes over national security-based measures which are challenged as protectionist in other forums such as international arbitrations.

This article proceeds as follows: Part II provides a historical perspective of the U.S.-China relationship including the transformational shift in perceptions as China is increasingly viewed as endeavoring to replace the United States as the dominant global power, and the complexities emanating from China's unique political-economic governance. Part III provides an overview of economic torts focusing on the definition of commercial disparagement, detailing the elements of establishing a claim such as proving intent and distinguishing between present and future losses. Part IV discusses the potential commercial disparagement arising out of governmental statements accompanying national security-based measures. Part V analyzes a potential commercial disparagement claim filed against the U.S. Federal Government, the problem of immunity, as well as the potential of filing claims against individual U.S. states which are increasingly imposing measures, the question of proving intent, and whether the statement is true, false or recklessly made. Part IV also focuses on the conceptualization of national security which is vital since determining whether a product or service is indeed a threat must be evaluated against the understanding of security. Part VI offers some brief conclusory remarks.

II. RECENT HISTORICAL RELATIONSHIP BETWEEN CHINA AND THE UNITED STATES

This Part provides the context for the analysis of using economic disparagement to obtain compensation in the context of allegedly disparaging statements made when instituting national security measures. Understanding the geo-economic paradigm is essential, as international relations are intertwined with the imposition of national security measures and are crucial to evaluating whether statements regarding a competitor's corporations are made in good faith.

15. In general, claims have been filed focusing on investment or trade treaty violations, constitutional challenges, and other grounds for seeking redress. *See generally*, Ming Du, *Huawei Strikes Back: Challenging National Security Decisions Before Investment Arbitral Tribunals*, 37 EMORY INT'L L. REV. 1 (discussing some of these challenges). *See, e.g.*, *Ralls Corp. v. Comm. on Foreign Relations in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

A. U.S. Aspirations to Bring China Within the U.S. Orbit

International relations are inherently fluid, shaped by the ever-changing self-interests of nations. The relationship between the United States and China provides a powerful example. In 1969, at the height of hostilities and military clashes along the border between the two mammoth Communist powers—China and the former Soviet Union—the United States was asked by the Soviets what the U.S. response would be to a Soviet nuclear first strike on China.¹⁶ The intention of the Soviets in asking this question was—and remains—in dispute, although evidence exists that the Soviets were indeed considering a first strike on China, to which the United States warned the Soviets not to launch a strike.¹⁷ Sensing an opportunity to use China as a counterweight against the Soviets, seen as a more powerful enemy, the United States entered into relations with China and worked toward fostering a stronger relationship.¹⁸ Thus, U.S. policy toward China in the 1980s shifted toward cooperation, though it was clear that the United States did not intend to transform China into a peer competitor.

After the Soviet Union fell, China became the only remaining potential rival to the United States. China was integrated into the global trade order and, to a certain extent, global governance during the 1990s and 2000s. During this era, China was admitted into the WTO, academic and scientific exchanges commenced, U.S. policy-makers endeavored to promote business investment, and numerous U.S. businesses began operating in China. This strategy was based upon the expectation (or overly-optimistic hope) that global engagement would initiate Chinese domestic political-economic reforms¹⁹ and, therefore, China would

16. Memorandum of Conversation from U.S. Dep't of State on China and Vietnam (Aug. 18, 1969), <https://perma.cc/4LU6-DX2J> (“[A Soviet Secretary] asked point blank what the United States would do if the Soviet Union attacked and destroyed China’s nuclear installations.”); Memorandum from Henry A. Kissinger to President Nixon 4–5 (Sept. 29, 1969), <https://perma.cc/5V9M-XZFL> (reporting on Soviet probings “var[ying] in character from point-blank questions of [America’s] reaction to provocative musings by Soviets over what they might be forced to do against the Chinese, including the use of nuclear weapons.”).

17. See Memorandum from William P. Rogers, Sec’y of State, to President Nixon 2–3 (Sept. 10, 1969), <https://perma.cc/V6Y5-3NGP> (arguing Soviet probings were intended to gauge “American attitudes on the China issue” and were “curiosities rather than signals”); Intelligence Note from George C. Denney, Jr., Deputy Dir., Bureau of Intel. & Rsch., to the Acting Secretary of State 1 (Sept. 23, 1969), <https://perma.cc/NU6H-KEEE> (noting the Australian Communist Party’s alarm to “the present course of the Sino-Soviet dispute”); Andrew Osborn & Peter Foster, *USSR Planned Nuclear Attack on China in 1969*, TELEGRAPH (May 13, 2010), <https://perma.cc/5UW6-NGBB> (reporting in a CCP-approved publication that, in 1969, the Soviets informed the United States of plans for a surprise nuclear strike on China to prevent misinterpretation. Allegedly, the United States warned it would retaliate with a nuclear strike on the Soviet Union, deterring the attack).

18. Memo from Kissinger to Nixon, *supra* note 16, at 3 (“[W]hen the Soviets would like to keep the Chinese Communists out of the UN, we are making clear that our real interest is in keeping the Republic of China in.”).

19. The dramatic conversion is exemplified by NSS documents. Compare GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 4 (2002), <https://perma.cc/J438-9WXT> (“In time, [China] will find that social and political freedom is the only source of national greatness.”), and GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 47 (2006), <https://perma.cc/8KB6-TLSN> (“China’s leaders cannot let their population

board the “inevitable ship of liberal democracy,” folding into the U.S.-led Western liberal world order.²⁰

B. Chinese Ambitions and U.S. Resistance to China’s Rise

From the U.S. national interest perspective, in hindsight, this strategy was exceptionally naïve as the United States unintentionally built an adversary into a peer-rival. China’s establishment of alternatives to Western-led governance institutions such as BRICS,²¹ Asia Infrastructure and Investment Bank (“AIIB”), and New Development Bank (“NDB”), demonstrates that China has long harbored ambitions to challenge and eventually supplant the U.S.-led Western order.²²

Cementing this perception, Chinese policies are seemingly driven by efforts to delegitimize U.S. allies, as evinced by two significant recent foreign policy strategies. The first is the “friendship without limits” between China and Russia articulated shortly before Russia’s invasion of Ukraine. This was followed by the Russian invasion of Ukraine in 2022, which has resulted in intentionally caused massive civilian casualties, injuries, and damage. Eminent legal scholars have universally condemned the 2022 Russian invasion as an egregious violation of international law.²³ However, China has refused to condemn Russia for its invasion and Chinese policies are alleged to encompass aiding the Russian war effort.²⁴ The fact

increasingly experience the freedoms to buy, sell, and produce, while denying them the rights to assemble, speak, and worship.”), with DONALD J. TRUMP, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 25 (2017) <https://perma.cc/T8A6-6LFY> (“China seeks to displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model, and reorder the region in its favor.”). The deterioration in relations was discernable towards the end of the Obama Presidency. See Julien Chaisse, *State Capitalism on the Ascent: Stress, Shock, and Adaptation of the International Law on Foreign Investment*, 27 MINN. J. INT’L L. 339, 353 (2018) (“China’s revival threatens American power, especially in the Asia-Pacific region. This situation has been clear for some time, at least for observers who know what they are talking about.”).

20. Another alternative view is that China’s rise was tolerated—but up to a point. See Larry Catá Backer, *Encircling China or Embedding It?*, *BLOGGER.COM* (Nov. 8, 2010), <https://perma.cc/B273-B8BA> (“[T]he Chinese suggest that American policy has been to engage China economically while creating an effective military encirclement that would enhance the American position in the event of conflict.”).

21. BRICS stands for Brazil, Russia, India, China, and South Africa. See Mariel Ferragamo, *What Is the BRICS Group and Why Is It Expanding?*, *COUNCIL ON FOREIGN RELS.* (Dec. 12, 2024), <https://perma.cc/KU8H-M9RA>.

22. See GERMAN NATIONAL SECURITY STRATEGY, *supra* note 5, at 24 (“International economic and financial institutions are more frequently an arena in which political power struggles are fought and are often the target of such maneuvers. The establishment of new, parallel institutions with divergent rules is designed to willfully circumvent existing organizations.”).

23. See, e.g., Peter Hilpold, *Justifying the Unjustifiable: Russia’s Aggression Against Ukraine, International Law, and Carl Schmitt’s “Theory of the Greater Space”* (“*Großraumtheorie*”), 22 CHINESE J. INT’L L. 409, 431 (2023) (“To show comprehension for Putin’s justifications based on fully unacceptable distortions of international legal rules and for the rest . . . would throw the international community back to the early 1920s.”).

24. Alicja Bachulska et al., *China and Russia: A Friendship Without Limits*, *EUR. COUNCIL ON FOREIGN RELS.* (Mar. 31, 2023), <https://perma.cc/74E7-R6QU>; accord Elizabeth Wishnick, *The China-Russia ‘No Limits’ Partnership Is Still Going Strong, with Regime Security as Top Priority*, *S. CHINA MORNING POST* (Sept. 29, 2022), <https://perma.cc/2CMU-44EK> (discussing the China-Russia ‘no-

that Ukraine is a U.S. ally and Russia is a U.S. adversary is the perceived rationale for China's policy.²⁵

In another context, China has refused to condemn Hamas for the October 7, 2023, terror attack on Israel. The attacks, filmed proudly by Hamas, provide evidence of a barbaric assault that resulted in the death of 1,200 Israeli civilians and hostage-taking, burning babies, execution of parents in front of their children and children in front of parents, and the massacre of young people at the Nova dance festival.²⁶ However, rather than condemn Hamas, China has in fact condemned Israel for its defensive military operation against Hamas. China has also alleged Hamas had a "right to resist" on October 7, thus ostensibly justifying the terrorism.²⁷ Similar to the Russia-Ukraine context, the perception is that China's pro-Hamas policies are driven by the fact that Israel is a U.S. ally.²⁸

C. China's Unique Domestic Governance System and the Commercial-National Security Nexus

The two Chinese policies noted above contribute to the perception that China is increasingly willing to contest the U.S.-led Western international order. If successful, this would have enormous implications on global governance.²⁹

limits' partnership); OFF. OF THE DIR. OF NAT'L INTEL., SUPPORT PROVIDED BY THE PEOPLE'S REPUBLIC OF CHINA TO RUSSIA 3 (2023), <https://perma.cc/FH2P-62HD>; see also Alberto Nardelli & Jennifer Jacobs, *China Providing Geospatial Intelligence to Russia, US Warns*, BUS. STANDARD (Apr. 6, 2024) (China accused by the U.S. of providing substantial assistance to Russia).

25. Nick Paton Walsh, *China tells EU it can't accept Russia losing its war against Ukraine, official says*, CNN (July 4, 2025) ("Chinese Foreign Minister Wang Yi told the European Union's top diplomat that Beijing can't accept Russia losing its war against Ukraine as this could allow the United States to turn its full attention to China.").

26. Adam Durbin, *Israel Gaza: China Condemns US Veto of Call for Immediate Ceasefire at UN*, BBC (Feb. 21, 2024), <https://perma.cc/73XJ-XU26>; JNS TV, *Bearing Witness: Kibbutz Be'eri, Hamas and a World Gone Mad*, YOUTUBE (Nov. 1, 2023), <https://perma.cc/6YRG-8NUT>; India Today, *Horrific Body Camera Footage Reveals Brutality of Hamas Terrorists During Oct 7 Massacre*, YOUTUBE (Oct. 23, 2023), <https://perma.cc/9ERC-CUPJ>; Hindustan Times, *Hamas Militant's Chilling Call to Family After Oct 7 Israel Massacre: 'Your Son's a Hero'*, YOUTUBE (Oct. 25, 2023), <https://perma.cc/WBX5-HP8L>.

27. *China to ICJ: Palestine has 'inalienable right' to armed resistance*, YOUTUBE (Feb. 22, 2024), <https://perma.cc/4QK3-PXAM>. However, on October 7, 2023, no Israelis were in Gaza, so there was no occupation to "resist" even assuming *arguendo* conduct consisting of executing civilians, gang rapes, and hostage taking constituted legitimate resistance under international law. Of course, such "resistance" is universally condemned as constituting grievous violations of international law. The intentional murder of civilians, and "willfully causing great suffering or serious injury" when wounding victims, constitute quintessential war crimes. See Fourth Geneva Convention art. 147, Aug. 12, 1949; see also Rome Statute art. 8 (willful killing is a war crime); see generally S.R. Ratner, *Categories of War Crimes*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW (Roy Gutman & David Rieff eds., 1999) (intentional murder of civilians committed either by a state or a non-state actor constitutes a grave violation of the Geneva Convention).

28. Ahmed Aboudouh, *China's approach to the war in Gaza is not anti-Israel. It's designed to contain the US*, CHATHAM HOUSE, THE ROYAL INSTITUTE OF FOREIGN AFFAIRS (Jan. 10, 2024) ("It is now clear that China is adopting the Ukraine playbook on the Israel-Hamas war, seeking to publicly chart a different course from the US and its allies and their unconditional support for Israel.").

29. See Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT'L L. 945, 950 (2016) ("In particular, there does not appear to be a

Furthermore, these policies corroborate the geo-strategic considerations driving the Party's decisions. This is important in the commercial disparagement context because the central issue in disparagement is whether the claim is false or reckless. The question of whether the product or service constitutes a national security threat might be impacted by China's political-economic governance and grand strategy.

In China, the CCP is the ultimate authority and is omnipresent in the economy since political interests reign supreme, even over economic interests.³⁰ In China's state-centric system, the Party-State owns shares in important corporations, provides subsidies and support to strategic businesses (i.e., national champions), and plays a prominent role in promoting Chinese economic actors globally.³¹ Significantly, private economic actors must adhere to the directives of the Party, as the CCP imposes discipline to ensure even private actors yield to their policy objectives.³² For example, billionaire Jack Ma "vanished" after critiquing Chinese regulators.³³ In contrast to market capitalism, China's state-capitalism obligates Chinese businesses to respect Party goals which may be embedded within private actors that constitute important or strategic corporations.³⁴ National goal promotion, or the advancement of strategic objectives, might mean that private corporate decision-making is also twinned with a Party goal. For state-linked entities such as state-owned enterprises, this duality should arguably be presumed.³⁵ However,

comparable example of a great power (or multiple powers) rising within a normative framework not of its own making, where that normative framework has not undergone substantial change or revolution as a result of the new power's values and interests.").

30. Joel Slawotsky, *The Impact of Geo-Economic Rivalry on U.S. Economic Governance*, 16 VA. L. & BUS. REV. 559, 580-86 (discussing China's unique economic governance and how that affects Chinese corporations, including ostensibly private entities). See, e.g., Sara Zheng, *Alibaba Discloses State Ownership in More Than 12 Business Units*, BLOOMBERG (Feb. 26, 2024) (reporting that Alibaba, despite being ostensibly private, admitted in response to a U.S. Securities and Exchange Commission inquiry that the Chinese government holds a stake in the company). For state institutions such as state-linked or state-owned businesses, Party approval and influence over business decisions has increased in recent years.

31. Ming Du, *International Economic Law in the Era of Great Power Rivalry*, 57 VAND. J. TRANSNAT'L L. 723, 737 (2024) ("China's industrial policies deploy extensive government guidance, massive subsidies, forced technology transfer, overseas mergers and acquisitions, and other types of regulatory support, while limiting market access and government procurement for foreign goods and services, to seek the dominance of SOEs and other targeted domestic companies in domestic and international markets.").

32. See Slawotsky, *supra* note 30, at 569-72.

33. Sherisse Pham, *Beijing Just Yanked Ant Group's IPO to Show Jack Ma Who's Really in Charge*, CNN (Nov. 4, 2020), <https://perma.cc/74Z5-K8D3> ("Beijing just showed tech titan Jack Ma and the rest of China's billionaire tycoons who's really in charge."); *Jack Ma Isn't Back*, WIRED (June 15, 2023), <https://perma.cc/PMT8-KAKU> ("The iconic Alibaba founder disappeared after criticizing China's government. He returned to the country in March—as a teacher, not a businessman.").

34. See Slawotsky, *supra* note 30, at 581-83 (Party cells embedded in important businesses); see also OFF. OF THE PRES. OF THE UNITED STATES, UNITED STATES STRATEGIC APPROACH TO THE PEOPLE'S REPUBLIC OF CHINA 7 (2020), <https://perma.cc/5S78-4QNP> ("The PRC's attempts to dominate the global information and communications technology industry through unfair practices is reflected in discriminatory regulations . . . PRC laws compel companies like Huawei and ZTE to cooperate with Chinese security services, even when they do business abroad, creating security vulnerabilities for foreign countries and enterprises utilizing Chinese vendors' equipment and services.").

35. Qingjiang Kong, *Emerging Rules in International Investment Instruments and China's Reform of State-owned Enterprises*, 3 CHINESE J. GLOB. GOVERNANCE 57, 73 (2017) ("SOEs are exactly established to execute national strategic goals.").

Party objectives reflect national ambitions which might be (and will likely be) contrary to U.S. national security interests. This not only further corroborates the importance of commercial conduct to the U.S.-China rivalry but bears directly on whether Chinese economic actors constitute security threats. Interestingly, in Western nations where market-capitalism has prevailed, governments are also incorporating aspects of state-centric economics and the link between businesses and governments will likely continue to increase.³⁶

The importance of commercial conduct to national security is manifestly clear, and a raft of measures designed to defend U.S. national security now involve commercial activities.³⁷ Regarding outbound investment review, in 2023, President Biden signed an Executive Order instructing the relevant agencies to develop rules barring persons under U.S. jurisdiction from investing in (or requiring notification to U.S. regulatory agencies when investing in) businesses, organizations, and governmental or political entities from “countries of concern.” There were only three jurisdictions listed: China, the Hong Kong Special Administrative Region (“HKSAR”), and Macau. The Executive Order further specified preventing investment with regard to semiconductors and microelectronics, quantum information technologies, and artificial intelligence.³⁸

To be sure, China also recognizes the importance of corporations to Chinese national security, exemplified by:

China’s crackdown on corporations accused of mishandling data since “China has deemed [data] an issue of national security.” The Chinese government recognizes the nexus between corporations and national security and has increasingly fined Chinese corporations over endangering national security. For example, China sanctioned DiDi Global \$1.2 billion for data breaches. China’s Alibaba and Tencent were similarly targeted with large fines for alleged violations of data security. The saga over the DiDi IPO in New York further illustrates the importance of corporations to national security and the hegemonic competition.³⁹

36. See Bob Swan: *Open Letter to President-elect Biden*, INTEL (Nov. 23, 2020), <https://perma.cc/Z7V3-ZBN7> (“[F]oreign government subsidies to national champions are a significant disadvantage for U.S. semiconductor companies that make substantial capital investments domestically. A national manufacturing strategy, including investment by the U.S. government in the domestic semiconductor industry, is critical to ensure American companies compete on a level playing field and lead the next generation of innovative technology.”); Gabriel Wildau, *China’s Industrial Policies Work. So Copy Them*, BLOOMBERG (Nov. 16, 2019) (Former Google CEO Eric Schmidt urges U.S. government to “partner with the commercial sector” to promote U.S. dominance in AI).

37. See Kimberley Kao, *TikTok Faces U.S. Ban in New Draft Bill*, WALL ST. J. (Mar. 6, 2024) (on file with the Journal of Corporation Law) (noting Congressional developments to ban TikTok unless it changes its ownership structure).

38. Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern, Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 9, 2023).

39. Joel Slawotsky, *U.S. Corporate Director Responsibilities to Oversee National Security Threats in an Era of Great Power Rivalry*, 49 J. CORP. L. 874, 904 (2024) (citations omitted); see also Sheng Zhang, *Protection of Foreign Investment in China: The Foreign Investment Law and the Changing Landscape*, 23 EUR. BUS. ORG. L. REV. 1049, 1066–68 (2022) (discussing the expanded conceptualization of national security in the context of China’s Foreign Investment Law and other

Data is considered a particularly important element of Chinese national security.⁴⁰ This is unsurprising given data's importance to AI and other emerging technologies.

In sum, the hegemonic competition between China and the United States has generated numerous national security-based measures linked to corporations. Often, if not almost always, these measures are accompanied by statements claiming the measure is needed to defend against national security threats. If an economic actor is labeled a national security risk and loses an existing contract, is banned from bidding, or loses "goodwill" for future business, can that entity file a disparagement claim against the entity so claiming?⁴¹

III. ECONOMIC TORTS

Economic relations, both domestically and globally, require a stable legal architecture that ensures economic actors can compete vigorously – but fairly – for contracts, transactions, and sales. Economic actors, consumers, and prospective business partners depend on the quality and reputation of products and services to maintain and build future commercial relationships. Unsurprisingly therefore, interference with ongoing commercial relations or an existing contract is well-recognized in both civil and common law legal systems. The 1853 English case of *Lumley v. Gye*⁴² is known for placing economic torts "on the map."⁴³

[O]ur change of view has been brought about by our present belief that rights of the parties to an existing contract are of such importance in the business

Chinese laws). Indeed, China's 2015 National Security Law expanded notions of security into the realms of the environment, finance, information technology, culture, ideology, education, and religion. See *National Security Law*, CHINA L. TRANSLATE (July 1, 2015), <https://perma.cc/GWW7-2RTE> (discussing the preservation of national security); Daisuke Wakabayashi et al., *China Expands Scope of 'State Secrets' Law in Security Push*, N.Y. TIMES (Feb. 28, 2024) (on file with the Journal of Corporation Law) ("China passed revisions to an already stringent state secrets law, broadening the scope of the type of information that would be considered a national security risk in the world's second-largest economy.").

40. See generally Raymond Yang Gao, *A Battle of the Big Three? — Competing Conceptualizations of Personal Data Shaping Transnational Data Flows*, 22 CHINESE J. INT'L L. 707 (2023) (China emphasizes the vital importance of data and conceptualizes data in terms of national security. In contrast, the U.S. understands data in terms of commerce, while the EU views data in terms of rights). Interestingly, both the U.S. and EU are rapidly moving toward China's conceptualization of data as an aspect of national security. See, e.g., Exec. Order No. 14117, Fed. Reg. 15421 (Feb. 28, 2024).

41. States may have privileges which immunize them from tort claims, although those may be eliminated in the context of international investment law. See, e.g., Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441 (d), 1602-1611 (1982)). States can waive liability from suit by signing investment treaties. See Andrea K. Bjorklund et al., *State Immunity as a Defense to Resist the Enforcement of ICSID Awards*, 35 ICSID REV. - FOREIGN INV. L. J. 506, 508-09 (2020).

42. *Lumley v. Gye*, 118 Eng. Rep. 749 (1853).

43. See John H. Wigmore, *Interference with Social Relations*, 21 AM. L. REV. 764, 770 (1887) (describing the *Lumley* decision as articulating a "new principle" that interference "with any contractual relation was actionable"); G.A. Owen, *Interference with Trade: The Illegitimate Offspring of an Illegitimate Tort?*, 3 MONASH U. L. REV. 41, 48 (1976) ("The case represents the beginning of the evolution of the tort of inducing breach of contract.").

world that such rights should be protected from intentional and unjustified interference by a third person.⁴⁴

In the context of national security, accusing a plaintiff's product of constituting a national security threat might fall within the ambit of disparagement if it leads to interference in commercial relations. This Part discusses the issue of commercial disparagement and sets out the elements of pursuing an economic tort claim, the required intent, as well differences in claiming present as opposed to future damages.

A. Commercial Disparagement

Falling within the framework of economic torts is the tort of "commercial disparagement," a form of unfair interference with economic relations,⁴⁵ with claims based upon "injurious falsehood"⁴⁶ or "trade libel."⁴⁷ In essence, disparagement causes one party to be induced to break off commercial relations with another party.⁴⁸ The tort has significantly developed in the United States over recent decades through court rulings finding that interference in contractual relations constitutes a compensable tort.⁴⁹ The tort's purpose is to discourage competitors from employing disparagement as a tactic to win business.⁵⁰

Disparagement encompasses claims alleging poor quality, defectiveness, or accusing a product or service of having safety issues.⁵¹ Disparagement can take a

44. *Downey v. United Weather Proofing, Inc.*, 253 S.W.2d 976, 981 (Mo. 1953) (citing *Lumley v. Gye*).

45. See generally FOWLER V. HARPER ET AL., LAW OF TORTS § 6.1 (2d ed. 1986) (discussing product disparagement as an offshoot of cause of action for interference with contractual relations).

46. Sir John Salmond coined the term "injurious falsehood." J. SALMOND, LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES § 151 (10th ed. 1945).

47. See WILLIAM J. PROSSER, HANDBOOK OF THE LAW OF TORTS 938 § 122 (3rd ed. 1964) (describing disparagement as "injurious falsehood" and "trade libel"). Notwithstanding the term "libel," disparagement is distinct from defamation. Defamation is cognizable when false statements injure the personal reputation of the plaintiff. In contrast, compensable disparagement exists when false or recklessly made statements harm the business interests of the plaintiff, proximately causing pecuniary losses. Thus, for disparagement, damage to personal reputation is not required as it is for libel.

48. HARPER ET AL., *supra* note 45.

49. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 866 (Tex. App. 1987) (Texas appellate court upheld most of a multi-billion-dollar jury award in a tortious-interference action based on the claim that defendant tortiously interfered with plaintiff's offer to buy third company). In common law countries, economic torts are also being litigated more frequently. See *Hamann v. Carpenter*, 937 F.3d 86, 88 (1st Cir. 2019); *Testing Systems, Inc. v. Magnaflux Corp.*, 251 F. Supp. 286, 290 (E.D. Pa. 1966). Interestingly, the paradigm of tortious interference with contractual relations can also be understood not as a quest for compensation but a demand for specific performance which is particularly intriguing in the context of the U.S.-China rivalry and national security. See *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 959 (1964) (motivation of developing the tort of interference was to secure contractual performance).

50. See Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 CHICAGO L. REV. 61, 67-69, 81 (1982), <https://perma.cc/JGM4-TLCS>.

51. There are many potential claims which fall under the rubric of "economic torts." These encompass unfair competition, trade libel, boycotts, injurious falsehood, interference with contractual

wide variety of forms such as knowingly false statements, unverified innuendo, or unverified and recklessly made claims disparaging the product or service of a competitor.⁵² Reputation is particularly important, as a “good name” maintains and generates future business while a “bad name,” particularly for quality or safety, is inimical to business retention or development. Competitors are thus incentivized to ascribe highly uncomplimentary descriptions or assert negative claims, i.e., disparaging statements, about their competition in an effort to seize market share and decimate their competitors. Accordingly, anti-competition laws strongly oppose making derogatory comments impinging on the reputation of a competitor’s products since disparagement erodes the economic efficiency of markets. However, mere comparisons, good-faith assertions, or truthful statements do not constitute commercial disparagement.

The tort of economic disparagement allows plaintiffs to file for compensation for financial damages proximately caused by the defendant’s disparaging statements ascribed to the competitor’s product or service. Many jurisdictions permit compensation for the economic losses proximately caused by interference.⁵³ While differences between jurisdictions exist, generally, the law is clear that disparagement occurs when a derogatory statement(s) is published with the intention (or with reckless disregard) of causing third-parties to refrain from engaging in commercial conduct with the plaintiff. The losses may be immediate, in the short term, or loss of future business. The linkage between the cancellation of the business with the disparaging statements may be relatively easy to establish for immediate or short-term commercial relationships depending upon the facts. However, establishing a causal link is more difficult in regard to future business relations.

B. Elements of Commercial Disparagement

While differences between jurisdictions exist, the law is generally clear that disparagement occurs when a derogatory statement(s) is published with the intent to discourage (or with reckless disregard of causing) third-parties from engaging in commercial conduct with the plaintiff. This is an increasingly important issue in the context of competition law given that the negative effects of disparagement

relations, interference with prospective commercial relations, and other interference with a plaintiff’s right to engage in commercial conduct. See LOUIS ALTMAN ET AL., *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES* § 11:13 (4th ed. 2008) (noting that commercial disparagement is an integral part of economic torts).

52. “Disparagement” is defined by the Restatement of the Law of Torts as a “matter which is intended by its publisher to be understood to cast doubt upon the existence or extent of another’s property in land, chattels or intangible things, or upon their quality.” *RESTATEMENT OF TORTS* § 629 (AM. L. INST. 1938). Disparagement is also described as “injurious falsehood” and “trade libel.” *PROSSER*, *supra* note 47.

53. See Hazel Carty, *The Modern Functions of the Economic Torts: Reviewing the English, Canadian, Australian, and New Zealand Positions*, 74 *CAMBRIDGE L. J.* 261, 264-65 (2015). The U.K. and Canada also recognize economic disparagement. See *OBG Ltd. v. Allan* [2007] UKHL 21 (U.K.); *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 (Can.).

may be manifested rapidly in light of media technologies and the internet enabling such statements to be communicated instantly.

1. Existing Commercial Relations

As with most torts, there is no universal pathway for proving a disparagement claim, as each jurisdiction can develop its own specific case law, although in each jurisdiction the burden of proof lies with the plaintiff. However, generally speaking, the tort is similar across U.S. state courts. For example, in Illinois, interference with an existing contract has the following elements:

(1) plaintiff and a third party enter into a valid contract; (2) the defendant is aware of the contract; (3) defendant intentionally and/or without justification induced the third party to violate or rescind the contract; (4) and the defendant's wrongful conduct proximately caused the plaintiff financial damages.⁵⁴ However, if the defendant can prove that the statements or conduct was based on defending an interest that outweighs the plaintiff's interest, that may potentially serve as a defense.⁵⁵

Similarly, Texas courts use four parallel elements in weighing whether disparagement took place: (1) the plaintiff entered into an existing contract that is "subject to interference"; (2) the defendant engaged in a "willful or intentional act of interference" with the contract; (3) the conduct proximately caused damage to the plaintiff; and (4) which resulted in "actual damage or loss" to the plaintiff.⁵⁶

In New York, tortious interference encompasses: (1) existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procurement of the third party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom.⁵⁷ Intent is present when either (1) the defendant has caused through inducement the third party to breach its contract with the plaintiff, known as "but for" causation, or (2) the defendant has otherwise rendered the third party's performance of that contract impossible.⁵⁸

New York courts often refer to §766 of the Restatement (Second) of Torts as the determinative factor in evaluating tortious interference with economic relations cases.⁵⁹ The Restatement defines tortious interference with contract as "intentionally and improperly interfer[ing] with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract."⁶⁰ This understanding of intent is found in Comment h to Restatement §766 referring to "inducing or otherwise causing":

54. *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 154-55 (Ill. 1989).

55. *Id.* at 157-58.

56. *Prudential Ins. Co. of America v. Fin. Rev. Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

57. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (N.Y. 1996).

58. *Alken Indus., Inc. v. Toxey Leonard & Assoc., Inc.*, No. 17304-11, slip op. 31864(U), at *5 (N.Y. Sup. Ct. 2013) (quoting *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (N.Y. 1993)).

59. *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 189-90 (N.Y. 1980).

60. RESTATEMENT (SECOND) OF TORTS § 766 (AM. L. INST. 1977).

The word “inducing” refers to the situations in which A causes B to choose one course of conduct rather than another. Whether A causes the choice by persuasion or by intimidation, B is free to choose the other course if he is willing to suffer the consequences.⁶¹

Thus, across most jurisdictions, to constitute a compensable tort of disparagement, the plaintiff must prove that the allegedly false statement was known by the defendant to be untrue or was recklessly made. A *prima facie* case for commercial disparagement includes: (1) the publication or communication of disparaging statements or descriptions that would cause third-parties not to engage in commercial relations with the plaintiff or buy the plaintiff’s product; (2) the statements are false; (3) the statements were made intentionally to discourage third-parties from transacting or contracting with the plaintiff or from purchasing plaintiff’s products or otherwise to interfere with plaintiff’s commercial relationships (or made with reckless disregard to the truth); and (4) damages in the form of monetary loss.⁶² However, if the claim is true, then this serves as an absolute defense to a disparagement claim.

2. Future Commercial Relations

As with claims for interference with current relations, each jurisdiction has its own specific approach to the elements of a claim for interference with future relations. Yet, as with interference claims for current relations, there are broadly similar principles shared by various jurisdictions. To pursue a claim for interference in future relations in Illinois courts, the elements of a claim for interference with a future contract are: (1) the plaintiff had a reasonable expectation of entering into or continuing a valid business relationship with a third party; (2) the defendant knew of that expectation; (3) the defendant intentionally and without justification interfered with that expectation; and (4) the defendant’s interference prevented the plaintiff’s legitimate expectation from turning into a commercial relationship⁶³ resulting in damages.⁶⁴

Similarly, in Virginia, the elements needed for a viable tortious interference of future economic relations are that the plaintiff must: (1) demonstrate the existence of a business relationship or expectancy, with a probability of future economic benefit; (2) prove knowledge of the relationship or expectancy; (3) show that it was reasonably certain that absent intentional misconduct, the claimant would have continued in the relationship or realized the expectancy; and (4) show that it suffered damages from the interference.⁶⁵ Interestingly, there is often

61. *Id.*

62. See *Aetna Cas. and Sur. Co., Inc. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988); WILLIAM L. PROSSER & WERDNER P. KEETON, ON THE LAW OF TORTS 967-70 § 128 (5th ed. 1984).

63. See *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483-84 (Ill. 1998).

64. *Voyles v. Sandia Mortg. Corp.*, 196 Ill. 2d 288, 300-01 (Ill. 2001).

65. See, e.g., *Levine v. McLeskey*, 881 F.Supp. 1030, 1057 (E.D. Va. 1995), *aff’d in part, vacated in part, and remanded*, 164 F.3d 210, 211 (4th Cir. 1998) (citing *Glass v. Glass*, 321 S.E.2d 69, 77 (Va. 1984)).

a distinction between current and prospective claims. In prospective economic relations suits, plaintiffs must generally demonstrate that the defendant employed “improper methods.”⁶⁶ “Improper methods” encompasses conduct such as methods “that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules,”⁶⁷ “violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of insider or confidential information, or breach of a fiduciary relationship.”⁶⁸ However, even “unethical conduct . . . , sharp dealing, overreaching, or unfair competition” may constitute improper methods.⁶⁹

According to Texas courts, to claim interference with future commercial relations, a plaintiff must demonstrate (1) a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) defendant acted purposely or with reckless disregard to prevent the relationship from ripening or was aware and confident (or substantially certain) relations would be blocked as a result of the conduct; (3) defendant’s conduct was tortious or unlawful; (4) the interference proximately caused the plaintiff damage; and (5) the plaintiff suffered monetary loss or financial damage as a result.⁷⁰

C. The Element of Intent

In a tortious-interference case, the plaintiff must show that the defendant intentionally caused the breach of the plaintiff’s commercial relationship or contract with a third party.⁷¹ The requirement of establishing intent is consistent across U.S. states.⁷² Generally, a defendant has acted intentionally if the conduct was designed to bring about a particular result or if the defendant has knowledge of substantial certainty that acting in a particular way will cause a particular kind of harm.⁷³ However, truthful statements are an absolute defense to a disparagement claim. Therefore, even highly disparaging remarks made with the intent to disrupt a business relationship, if truthful, do not constitute compensable disparagement.

In New York, intent can be established in either of two circumstances: if the defendant caused through inducement the third party to suspend its commercial relations with plaintiff, i.e., “but for” causation, or, alternatively, if the defendant induces or causes the third party to refrain from continuing the relationship.⁷⁴

66. See *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., Inc.*, 254 Va. 408, 413-15 (Va. 1997).

67. *Duggin v. Adams*, 234 Va. 221, 227 (Va. 1987) (citation omitted).

68. *Id.*

69. *Id.* at 228.

70. *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 475 (Tex. App.-Hous. (1 Dist.) 2006).

71. *Chicago’s Pizza, Inc. v. Chicago’s Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 863 (Ill. App. Ct. 2008).

72. See *Methanex Corp. v. United States*, Partial Award on Jurisdiction and Admissibility, ¶ 158 (NAFTA Chap. 11 Arb. Trib. Aug. 7, 2002) (Methanex tribunal indicated that the establishment of intent pursuant to Article 1101(1) could be met by identifying “either a single or predominant purpose underlying a particular measure.”).

73. See RESTATEMENT (SECOND) OF TORTS § 8A (AM. L. INST. 1979).

74. *Alken Indus., Inc. v. Toxey Leonard & Assoc., Inc.*, No. 17304-11, slip op. 31864(U), at *5 (N.Y. Sup. Ct. 2013).

This understanding of intent may be particularly relevant for disparagement in the national security context, as will be discussed later. For example, informing allies that security cooperation will be suspended or that their alliance with the United States will be jeopardized might be viewed as intimidation. However, honest advice or a good-faith warning from one ally to another might be construed as lacking an intent to disparage, even assuming *arguendo* that the claim is unprovable.

D. Distinguishing Between Current and Prospective Commercial Relations

In contrast to existing economic relations, financial damage from interference with a prospective relationship or the loss of a contract in negotiation may be more difficult to prove. Furthermore, a prospective contract is considered to have less legal protection than a future potential contract.⁷⁵ Courts have a degree of deference for “hard competition” and economic efficiency would militate against chilling competition when no contract exists.⁷⁶ Indeed, a higher bar for finding interference with prospective commercial relations is sensible; societal interest is served by vigorous competition which may encompass uncomplimentary comparisons. However, intentionally false statements intended to prevent future relations may constitute cognizable disparagement claims as societal interests are also advanced by maintaining the illegality of deliberately false statements.

IV. COMMERCIAL DISPARAGEMENT IN THE NATIONAL SECURITY CONTEXT: POTENTIAL EXAMPLES OF DISPARAGEMENT

The incentive to engage in disparagement is increasing as the U.S.-China hegemonic conflict intensifies. Both U.S. and Chinese corporations are competing for market share, global dominance, and developing emerging technologies.⁷⁷ Given the incentives and opportunities, there is an increasing potential for reckless or false representations which may constitute commercial disparagement. This Part provides examples of disparaging statements in relation to China’s Huawei, as well as in the context of Chinese electric vehicles.

A. The Example of Huawei

The United States has alleged that Huawei, an ostensibly private economic actor, is in fact a veritable arm of the CCP⁷⁸ and poses a dire national security

75. See RESTATEMENT (SECOND) OF TORTS § 766B cmt. a (AM. L. INST. 1979) (“The law requires less third-party interference in contract cases than in business expectancy cases.”).

76. See RESTATEMENT (SECOND) OF TORTS § 768 cmt. a, b (AM. L. INST. 1979).

77. Hawkins, *supra* note 11.

78. The ownership structure is opaque and it is unclear who ultimately controls Huawei. See, e.g., Christopher Balding & Donald C. Clarke, *Who Owns Huawei?*, SSRN (Apr. 17, 2019), <https://perma.cc/Q5BK-X4UT> (Huawei is controlled by the State despite claims it is privately-owned by its employees); see also Tony Capaccio & Jenny Leonard, *Huawei on List of 20 Chinese Companies That Pentagon Says Are Controlled by People’s Liberation Army*, TIME (June 25, 2020), <https://perma.cc/PUJ3-Z6CT>.

threat for the United States.⁷⁹ In 2012, a report released by the House Permanent Select Committee on Intelligence concluded that using equipment made by Huawei and ZTE, another Chinese telecommunications company, could “undermine core U.S. national security interests.”⁸⁰ In 2018, the United States urged its citizens not to buy or use Huawei products or services, claiming that Huawei could steal information and engage in spying, and endeavored to convince other sovereigns not to engage in commercial relations with Huawei.⁸¹ In 2019, Huawei was placed on the Entity List barring U.S. persons from selling to Huawei unless government approval was obtained.⁸² In 2020, in an important policy speech by former National Security Advisor Robert C. O’Brien, O’Brien tied Huawei into the various prongs of the U.S.-China hegemonic rivalry.

The CCP accomplishes this goal, in part, by subsidizing hardware, software, telecommunications, and even genetics companies. As a result, corporations such as Huawei and ZTE undercut competitors on price and install their equipment around the globe at a loss. This has the side effect of putting out of business American manufacturers of telecom hardware and has made it very difficult for Nokia and Ericsson. Why do they do it? Because it is not telecom hardware or software profits the CCP are after, it is your data. They use “backdoors” built into the products to obtain that data.⁸³

Moreover, the United States has also spearheaded a global campaign to encourage allies to ban Huawei. Specifically, the United States has claimed that Huawei

79. Compare Harlan Cohen, *Nations and Markets*, 23 J. INT’L ECON. L. 793, 794 (2020), <https://perma.cc/G5EA-PE4F> (“[The U.S.] declaring Huawei a national security threat, has not only restricted its activities in its territory, but has openly lobbied other countries to ban it, dangling U.S. security cooperation as an incentive.”), and Tim Bowler, *Huawei: Why Is It Being Banned from the UK’s 5G Network?*, BBC (Jul. 14, 2020), <https://perma.cc/S9LR-QYFP> (UK bans Huawei based on national security concerns over Huawei), with Aziz El Yaakoubi & Eduardo Baptista, *Saudi Arabia Signs Huawei Deal, Deepening China Ties on Xi Visit*, REUTERS (Dec. 8, 2022), <https://perma.cc/J8SB-GUT5> (“Saudi Arabia and China showcased deepening ties with a series of strategic deals on Thursday during a visit by President Xi Jinping, including one with tech giant Huawei, whose growing foray into the Gulf region has raised U.S. security concerns.”).

80. HOUSE PERMANENT SELECT COMM. ON INTEL., 112TH CONG., INVESTIGATIVE REPORT ON THE U.S. NATIONAL SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COMPANIES HUAWEI AND ZTE 26 (Comm. Print 2012) (A report by Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger of the Permanent Select Committee on Intelligence), <https://perma.cc/5LCR-GBUZ>.

81. David Meyer, *U.S. Urges Other Countries to Shun Huawei, Citing Espionage Risk*, FORTUNE (Nov. 23, 2018), <https://perma.cc/Z4J4-R33P>.

82. Subsequently, major U.S. technology companies, such as Google, Broadcom, Intel, Qualcomm, and Xilinx, announced that they would no longer supply equipment or services to Huawei. See Michael Grothaus, *Google, Qualcomm, Intel, and Broadcom all cut ties with Huawei*, FAST COMPANY (May 20, 2019), <https://perma.cc/8EYT-XA2E>.

83. Robert C. O’Brien, Nat’l Sec. Advisor, *The Chinese Communist Party’s Ideology and Global Ambitions* (June 24, 2020) <https://perma.cc/G62S-6TLL>; see also MINORITY STAFF OF S. COMM. ON FOREIGN RELS., 116TH CONG., *THE NEW BIG BROTHER—CHINA AND DIGITAL AUTHORITARIANISM* 29 (Comm. Print 2020) (“Huawei’s 5G push continues to see success in other countries, especially ones in China’s Belt and Road Initiative, highlighting the company’s ability to dominate the 5G space by providing networks for prices estimated to be 30 percent less than its competitors.”).

infrastructure and products can steal data or otherwise conduct espionage – alleging in essence the Huawei products are defective.⁸⁴ The United States has warned these nations not to allow Huawei infrastructure into their jurisdictions⁸⁵ and urged other nations to remove previously installed Huawei infrastructure⁸⁶ or risk security cooperation with the United States.⁸⁷

Over the past few years, therefore, U.S. foreign policymakers have toured the world in an attempt to stop other countries from giving Huawei market access. The message conveyed is that countries that use Huawei equipment are choosing a path that poses a significant risk to the United States and its allies. In the most egregious cases, former U.S. Secretary of State Mike Pompeo warned, intelligence sharing, diplomatic and military ties, and partnerships with the United States would be off the table.⁸⁸

U.S. efforts have been particularly successful in the European Union, as Huawei is increasingly viewed as a threat capable of greatly damaging the EU.⁸⁹

The Commission underlines in its Communication its strong concerns about the risks posed by certain suppliers of mobile network communication equipment to the security of the Union. The Commission considers that decisions adopted by Member States to restrict or exclude Huawei and ZTE from 5G networks are justified and compliant with the 5G Toolbox. Consistently with such decisions, and on the basis of a broad range of available information, the Commission considers that Huawei and ZTE represent in fact materially higher risks than other 5G suppliers.⁹⁰

Given the strong EU position that Huawei constitutes a serious threat to EU national security, a ban on Huawei is increasingly possible by individual EU Members.⁹¹

84. Stefan Nicola, *Trump Blockade of Huawei Fizzles in European 5G Rollout*, BLOOMBERG (Mar. 19, 2019) (“Huawei’s gear would open a backdoor for Chinese spies.”).

85. Nick Wadhams, *Pompeo Boosts Huawei Warning with Threat to Limit Intelligence*, BLOOMBERG (Apr. 4, 2019).

86. Du, *supra* note 15, at 138 (“The U.S. has been pressuring its allies to follow suit, even threatening to stop sharing intelligence with them if Huawei equipment is used in their telecommunication system, as part of a larger crackdown on Huawei.”).

87. Stu Woo & Kate O’Keeffe, *Washington Asks Allies to Drop Huawei*, WALL ST. J. (Nov. 23, 2018).

88. O.S. Christie et al., *The US Way or Huawei? An Analysis of the Positioning of Secondary States in the US-China Rivalry*, 29 J. CHINESE POL. SCI. 77, 79-80 (2024).

89. See Thierry Breton, EU Comm’r for the Internal Market, On the Cybersecurity of 5G Networks, Speech Before the EU Commission (June 15, 2023) (“The situation with 5G should be no different: we cannot afford to maintain critical dependencies that could become a ‘weapon’ against our interests.”).

90. European Commission Press Release IP/23/3309, Commission Announces Next Steps on Cybersecurity of 5G Networks in Complement to Latest Progress Report by Member States (June 14, 2023).

91. Christina Cheng, *Is the EU Finally Headed Towards a Ban on Huawei?*, CHINA OBSERVERS (Sept. 7, 2023), <https://perma.cc/WJ2C-8AFW> (noting the “German government reversed its position and announced an investigation into Huawei. The evolution of Germany’s position shows how the

Indeed, the EU even joined the United States in urging other countries to ban Huawei. For example:

[t]he European Union and U.S. have warned Malaysia over risks to national security and foreign investment as it finalizes a review of its 5G rollout that could allow China's Huawei Technologies Co Ltd to bid for a role in its telecom's infrastructure.⁹²

To what extent the European Union has come to this conclusion on its own as opposed to information provided by U.S. authorities raises an interesting issue as to whether the EU policy was “self-taught” or based upon U.S. information.

In response, Huawei denies the claims, stating that the United States is making false statements out of competitive jealousy, essentially alleging, without specifying the underlying legal doctrine, that the United States is engaged in trade libel.⁹³ Moreover, Huawei insists that the CCP has no influence over it and there has never been any proof of malicious activity, spying, or any other conduct endangering U.S. security.⁹⁴ Similarly, Huawei alleges the European Union is wrong to “name and shame” the company as a national security threat.⁹⁵

B. Chinese Electric Vehicles

Electronic vehicles are inherently connected to data and potentially pose risks to national security through surveillance and the ability to be remotely disabled.⁹⁶ EVs are both data-driven and data-collectors through cameras, microphones, and other data sensors attached to the cars and capable of collecting and sending images and data.

Who controls these data flows and software updates is a far from trivial question, the answers to which encroach on matters of national security, cybersecurity, and individual privacy. For these reasons, policymakers must treat

strength of the economic and cultural relationships Huawei had cultivated within Europe has now been trumped by greater geopolitical developments.”); Christopher F. Schuetze, *Germany to Strip Huawei from Its 5G Networks*, N.Y. TIMES (July 11, 2024) (Germany to stop using critical components made by Chinese companies in their mobile infrastructure by 2029).

92. EU, *US Warn Malaysia of Security Risk in Huawei's Bid for 5G Role*, *Financial Times Reports*, REUTERS (May 2, 2023), <https://perma.cc/8YE3-KBSG>.

93. *Huawei: US Scared We Are Too Competitive*, BBC (Feb. 27, 2018), <https://perma.cc/9MEB-KKMA>.

94. *Is Safety the Real Reason to Ban Huawei*, HUAWEI (Feb. 14, 2019), <https://perma.cc/E2E2-ZRXU>.

95. Mathieu Pollet, *Huawei Pushes Back on the EU Calling it “High-Risk”*, POLITICO (Oct. 13, 2023), <https://perma.cc/KAN3-287R> (“Huawei told POLITICO in a statement Friday that the company “strongly opposes and disagrees with the comments made by the European Commission representatives publicly naming and shaming an individual company without legal basis while lacking any justification or due process.”).

96. Jim Tankersley, *Biden Calls Chinese Electric Vehicles a Security Threat*, N.Y. TIMES (Feb. 29, 2024) (“President Biden took steps on Thursday toward blocking internet-connected Chinese cars and trucks from entry to the American auto market, including electric vehicles, saying they posed risks to national security because their operating systems could send sensitive information to Beijing.”).

these new vehicles differently from cars as we once knew them. It is concerning that they have yet to fully do so.⁹⁷

Tesla cars are in fact increasingly banned in certain locations in China for precisely this reason.⁹⁸

In addition, Chinese electric vehicles are alleged to represent a threat to the U.S. economy and industrial base:

As the Chinese EVs go on sale across the country, America's homegrown EVs — costing an average of \$55,000, roughly double the price of their Chinese counterparts — struggle to compete. Factories close. Workers lose jobs across America's industrial heartland.⁹⁹

Furthermore, in addition to economic weakness and precipitating reliance on foreign supply chains, factory closures in turn reduce the U.S.' industrial capacity — a critical aspect of national security. In times of war, factories can be re-tooled for the manufacture of military weapons. A weak industrial base can therefore lessen a country's ability to defend itself and meet wartime needs.¹⁰⁰ As President Biden stated, even while “China is determined to dominate the future of the auto market, including by using unfair practices. . . China's policies could flood our market with its vehicles, posing risks to our national security. I'm not going to let that happen on my watch.”¹⁰¹

In another example, Chinese automaker BYD had been planning on building a factory in Mexico, but U.S. officials have urged Mexico not to allow the plant based on national security concerns.¹⁰² In sum, Huawei and Chinese EV manufacturers may represent entities possessing a potential claim for economic disparagement for lost sales both present and future if the claim that the specific business's products or services constitute national security threats are indeed false or were recklessly asserted.

97. Janka Oertel, *Security Recall: The Risk of Chinese Electric Vehicles in Europe*, EUR. COUNCIL ON FOREIGN RELS. (Jan. 25, 2024), <https://perma.cc/48TH-TFX9> (“Chinese brands are leading the way — and pose serious security issues which the European Union and member state governments must quickly address.”).

98. Cheng Ting-Fang & Shunsuke Tabeta, *Tesla Cars Face More Entry Bans in China as ‘Security Concerns’ Accelerate*, NIKKEI ASIA (Jan. 24, 2024) (“Sources told Nikkei Asia that a growing number of government affiliates, local authority agencies, highway operators and even cultural and exhibition centers have restricted Tesla cars from entering their premises since last year. Previously, such restrictions were generally limited to military bases.”).

99. Paul Wiseman, *U.S. Automakers Worried About Threat of Low-Priced Chinese EVs Made in Mexico*, PBS NEWS (June 27, 2024), <https://perma.cc/M4L5-PPSD>.

100. Mathieu Boulège et al., *Assessing Russian Plans for Military Regeneration*, CHATHAM HOUSE (July 9, 2024), <https://perma.cc/Y2RX-Z74J> (discussing factors involved in Russia's lackluster military performance in Ukraine and identifying a weak industrial base as among them).

101. Matthew Daly, *Biden Orders U.S. Investigation of National Security Risks Posed by Chinese-made ‘Smart Cars’*, ASSOCIATED PRESS (Feb. 29, 2024), <https://perma.cc/HA73-JSY4>.

102. Zacahary Visconti, *U.S. Legislators Warn Mexico's President of Chinese Vehicle Security Threats*, TESLARATI (Oct. 1, 2024), <https://perma.cc/4W56-GQ3L>.

V. LITIGATING COMMERCIAL DISPARAGEMENT IN THE CONTEXT OF NATIONAL SECURITY-BASED MEASURES

The issue of compensation for damages arising from governmental measures restricting trade is not new.

A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals' great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? . . . [W]as it ever imagined this was taking private property without compensation or without due process of law?¹⁰³

In the U.S.-China context, U.S. courts have been the venue for litigating non-tort-based claims regarding national security-based measures. While challenging national security-based claims runs up against the well-established “deference” to governmental agencies,¹⁰⁴ surprisingly, Chinese litigants have had some success. The Ralls litigation emanating from a CFIUS recommendation is one example.¹⁰⁵ Some claims have been based on constitutional grounds, others on the failure to comport with the Administrative Procedures Act.¹⁰⁶ Some courts have raised the possibility that other violations have occurred.¹⁰⁷

Claims within the economic torts' framework are also potential pathways to litigate claims made in conjunction with investment and trade measures, i.e., that a competitor's product or service is defective, unsafe, or dangerous to national security. This Part is structured as follows: the first section analyzes the jurisdictional question. The second section discusses a potential claim filed under a disparagement theory in a hypothetical context.

103. *Legal Tender Cases*, 79 U.S. 457, 551 (1870).

104. U.S. courts generally defer to Executive and Legislative Branch national security determinations. *See, e.g., Holder v. Humanitarian L. Project*, 561 U.S. 1, 33–34 (2010).

105. The Ralls litigation is the “landmark” ruling in which a federal appeals court found the procedure may have lacked constitutional guardrails. *See Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 71, 80 (D.D.C. 2013), *rev'd and remanded*, 758 F.3d 296, 326 (D.C. Cir. 2014) (D.C. Circuit rejects Executive Branch attempt to deprive foreign nationals of property rights, asserting that due process requires notice of unclassified evidence in which an official actor relies, even against the compelling interest of national security).

106. *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 73 (D.D.C. 2020) (court issued a preliminary injunction based on government's conduct exceeding authority under the Administrative Procedure Act (APA)); *see also* *Xiaomi Corp. v. Dep't of Def.*, No. 21-280, 2021 WL 950144, at *4-8 (D.D.C. Mar. 12, 2021) (Department of Defense (DOD) violated the APA due to an inadequate explanation and lack of “substantial evidence,” among other issues); *Luokung Tech. Corp. v. Dep't of Def.*, 538 F. Supp. 3d 174, 192-94 (D.D.C. 2021) (company's designation was arbitrary and capricious pursuant to the APA because it was not based on substantial evidence and exceeded DOD's statutory authority).

107. *Luokung*, *supra*, note 106, at 191 n.13, 193 (noting that Luokung shares only trade on Nasdaq and remarking Luokung “raise[s] serious concerns” about due process and “that the Court is concerned that the Department of Defense subjected a public company to de-listing from the only stock market on which its shares were listed [Nasdaq] with no notice or process whatsoever.”).

A. Jurisdiction

Generally, the defendant in disparagement litigation is a business competitor who issued negative remarks regarding the plaintiff's product or service. However, since private economic actors are closely linked to national security and in fact constitute national security assets, governments are likely to be the ones issuing allegedly disparaging statements. Moreover, sovereigns are now more engaged in economic matters given the geo-strategic realities.¹⁰⁸ No substantive reason exists to preclude disparagement as a vehicle for a tort claim in the context of governmental statements alleging a product or service constitutes a national security risk other than governmental immunity from suit as discussed below.

1. Suits Against the U.S. Federal Government for Disparagement

Do U.S. statements regarding alleged national security dangers of Chinese products and services constitute potentially cognizable disparagement claims? The principle of sovereign state immunity poses a serious challenge to a plaintiff as, generally speaking, governments usually have immunity from tort suits unless waived.¹⁰⁹

As a general rule, the federal government is immune from suits because of sovereign immunity. However, the Federal Tort Claims Act ("FTCA")¹¹⁰ is a statute that waives sovereign immunity in some circumstances. For example, pursuant to the commercial activity exception of the FTCA, federal governmental measures restricting commerce are potentially subject to tort-based claims for compensation from individuals, corporate citizens, investors, and other adversely impacted parties.¹¹¹ Therefore, theoretically, it could potentially be possible for a Chinese company to file an economic tort claim against the federal government for disparagement (presuming personal and subject matter jurisdiction exist).

However, the waiver has numerous exceptions such as the discretionary function exception, which excludes government liability for policy judgments.¹¹² The discretionary function exception to the FTCA ensures that federal government policymaking is an exception to the waiver, so a decision to label a product or serve as a security threat is most likely a valid exception.¹¹³ Moreover, and in perhaps a more daunting hurdle for plaintiffs alleging commercial disparagement, there are FTCA exceptions for libel and slander actions barring disparagement

108. See Moraes, *supra* note 9; see also Slawotsky, *supra* note 30.

109. While beyond the scope of this paper to delve into sovereign immunity, some have argued that the conceptualization of state immunity is outdated. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201-24 (2001) (arguing that the expansion in state sovereign immunity is problematic and should be eliminated by the Supreme Court).

110. 28 U.S.C. § 1346(b)(1); 28 U.S.C. §§ 2671-80.

111. 28 U.S.C. § 1605(A)(2).

112. 28 U.S.C. § 2680(a).

113. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (Congress "wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.").

claims.¹¹⁴ Therefore, suing the U.S. Federal Government for commercial disparagement would likely prove untenable if not impossible.

2. Suits Against States for Disparagement

Filing a disparagement claim against the federal government is not the only option. The United States has both a federal government and individual state governments.¹¹⁵ States are sovereign and extremely powerful economic actors in their own right. Some have substantial GDPs that rival most nations. Furthermore, states have regulatory power and may sign investment and trade memorandum of understandings (MoUs) with foreign nations.¹¹⁶

a. States and National Security Measures

What if states enact measures or restrictions alleging a Chinese entity is a national security threat? Increasingly, states are passing measures that often label China or Chinese economic actors generally as a national security threat and the state measures are aimed at responding to the threat.¹¹⁷ States are increasingly imposing their own measures, claiming the authority to do so as a police power reserved to the states by the Constitution to protect state-security and risks to the citizens of their states. While this article does not discuss the constitutionality of the measures, the question of the constitutionality of state measures reflects the long-standing debate over federal power and state rights.¹¹⁸ For example, Montana endeavored to ban TikTok invoking its police power to protect its citizens, but the state law was held unconstitutional as violating both the dormant Commerce Clause and federal foreign affairs preemption. The district court decision was granted before the federal government's action on TikTok requiring divestiture or sale to a U.S. buyer. The federal court ruling is, at the time of writing, on appeal.

In another example, Virginia prevented a Chinese investment in a car battery plant based on security grounds.¹¹⁹ According to the Virginia Governor, "China has a very clearly stated objective: and that is to dominate the world, and do that

114. 28 U.S.C §2680(h); 28 U.S.C §2674.

115. For an interesting discussion of states and federal governments in the context of jurisdiction, see Ray Worthy Campbell, *Personal Jurisdiction and National Sovereignty*, 77 WASH. & LEE L. REV. 97 (2020).

116. *U.K. and Texas Sign Trade Agreement as Broader Deal with U.S. Remains Stalled*, L.A. TIMES (Mar. 13, 2024), <https://perma.cc/ZKS9-PLAC>.

117. See James T. Areddy, *States Take On China in the Name of National Security*, WALL ST. J. (Apr. 26, 2024) ("From Florida to Indiana and Montana, an expanding array of local proposals, bills, laws and regulations aim to block Chinese individuals and companies from acquiring land, winning contracts, working on research, setting up factories and otherwise participating in the U.S. economy. State officials, overriding traditional local interests such as drawing investment and creating jobs, say they are acting where Congress hasn't to address grassroots American distrust of the Chinese Communist Party.").

118. Campbell, *supra* note 115.

119. Gregory S. Schneider and Laura Vozzella, *China Fuels Debate in Richmond After Youngkin Slams Door on Battery Plant*, WASH. POST (Feb. 20, 2023) ("All they have done is continue to massage the messaging around the fact that the technology at the heart of this battery is from Chinese Communist Party-influenced Contemporary Amperex Technology Limited (CATL).").

at the U.S.'s expense."¹²⁰ Iowa's legislature passed a bill limiting liability for pesticide sellers which excluded Chinese state-owned businesses.¹²¹ Additionally, in Governor Kristi Noem's 2024 State of the Union Address to South Dakota she also discussed Chinese investment in the United States:

China and other evil foreign governments are executing a plan to own our land and control our food supply. . . .

Congress has not taken action, and we cannot afford to wait another year. . . .

This is far too important to our national security to let another year go by and let our enemies gain a larger foothold in our economy and food supply chain.¹²²

In March 2025, a U.S. federal court found China liable for damages arising out of a suit filed by the State of Missouri over damages caused by the COVID-19 outbreak. China did not participate in the trial and a default judgement for \$24 billion was entered. Missouri intends to enforce the judgement by seizing Chinese assets both in Missouri and in other jurisdictions.¹²³ All of these examples demonstrate that states are increasingly active in national security-based and state security-based measures against China. If a state measure explicitly refers to a Chinese economic actor as constituting a security threat to the state, is there a potential economic disparagement claim?

b. States and Sovereign Immunity

While state governments also enjoy immunity,¹²⁴ this immunity has been substantially curtailed in most states by either legislative action, such as state Tort Claims Acts, or judicial policymaking. However, plaintiffs also face substantial hurdles inasmuch as often these state waivers of immunity contain exceptions for

120. Areddy, *supra* note 117.

121. S.F. 2412, 89th Gen. Assemb., Reg. Sess. (Iowa 2024).

122. Kristi Noem, Governor of South Dakota, 2024 State of the State Address (Jan. 9, 2024); *see also* Nick Balenger, *Alabama Lawmakers Looking to Stop Chinese from Buying U.S. Farmland*, WAFF (Jan. 25, 2025), <https://perma.cc/CD73-9XQF> ("We can't allow China to own 380,000 acres of U.S. soil," Congressman Dale Strong said. "And where is this property located? It's located around some of our largest military bases.").

123. John Hanna & Summer Ballentine, *Missouri Plans to Seize Assets to Make China Pay a \$24.5 Billion Judgment, but Can It Collect?*, ASSOCIATED PRESS (Mar. 11, 2025) ("Missouri Attorney General Andrew Bailey, [], hailed Friday's ruling . . . as a 'landmark victory' in efforts to hold China, its Communist Party and seven other government or scientific agencies responsible for the costs of the pandemic in the U.S. If China won't pay the award, the state will seize Chinese-owned assets, including farmland" "Those assets are not required to be within Missouri and can be located anywhere in the United States" "While we have not partnered with other states on this particular suit, we encourage others to work to hold the Chinese government accountable and seek justice for victims.").

124. Some have monetary limits or other aspects that impact the potential litigation. This paper focuses on tort claims rather than claims against states, their officers, and employees asserted under federal law. *See, e.g.*, 42 U.S.C. § 1983 (2018), or other similar statutes.

discretionary functions as well as for libel, slander, and damages caps.¹²⁵ State waiver statutes can be described as either (1) absolute waivers; (2) limited waivers applicable only to specific types of claims; or (3) general waivers subject to certain defined exceptions.¹²⁶ Yet, in contrast to the FTCA, several state Tort Claims Acts have a more lenient approach to the discretionary function exemption or for libel.¹²⁷ In sum, while Chinese economic actors may have a strong disadvantage in terms of asserting an economic tort claim against the U.S. Federal Government, such plaintiffs might potentially find it easier to assert disparagement claims against individual states, although limits on damages might curtail the productivity of such suits.

B. Analysis of Potential Claims in the Context of National Security Based Measures

1. The Question of Intent

In the current U.S.-China context, the incentive to engage in disparagement is increasing as the competition intensifies. Furthermore, sovereigns have become more active in national security issues that involve the private sector.¹²⁸ Given the incentives and opportunities, there is increasing potential of reckless or false representations which may constitute an economic tort.

In the context of challenges to statements regarding the national security threats of a plaintiff's product or service, the primary issue is intent, i.e., whether the allegations of national security threats are motivated to dent economic relations and/or to damage existing or future contractual relations. If so motivated, false or recklessly made statements might qualify as cognizable harm. The principles involved in evaluating such claims are equally applicable to claims concerning both current and future economic relations.¹²⁹

Generally, across jurisdictions, to prove interference with an existing contract several elements such as the existence of a contract and a breach of that contract are required. In a tortious-interference case, the plaintiff must show that the defendant intentionally caused the breach of the plaintiff's commercial relationship

125. Similar to the FTCA, state tort claims acts may provide for exceptions for libel and slander. State laws may also contain "discretionary function" exceptions to state liability, exempting liability for essential governmental functions that require discretionary judgment, such as policy level decisions. Note that state claims acts, as opposed to state tort claims acts, are another legislative enactment paradigm limiting sovereign immunity and providing for a mechanism to pursue claims.

126. Immunity and waiver issues are generally irrelevant to local authorities, such as municipalities. Local authorities are typically created by state legislatures and have their own rules and limitations as established by the state government.

127. Some states allow claims for discretionary functions but, although there is no absolute immunity, there is an added good faith requirement. Some states list slander as an exception to the waiver. See MATTHIESEN, WICKERT, & LEHRER, S.C., MUNICIPAL/COUNTY/LOCAL GOVERNMENTAL IMMUNITY AND TORT LIABILITY IN ALL 50 STATES (2022), <https://perma.cc/R7LL-ZQ7N> for an exhaustive review of each state's specific tort waiver laws.

128. See Moraes, *supra* note 9.

129. Proving damages is intrinsically easier for interference with a current commercial relationship. It is more complicated and somewhat speculative to prove damages arising from the prevention of a future or prospective contract or commercial relationship.

or contract with a third party.¹³⁰ The requirement of intent is consistent across states.¹³¹ Intent is found when a defendant has acted to bring about a particular result or if it has knowledge of substantial certainty that acting in a particular way will cause a particular kind of harm.¹³² Plaintiffs can prevail if the statements made by the competitor-defendant are false or made with reckless disregard to their veracity. Truthful statements constitute a defense to a disparagement claim. Therefore, even highly disparaging remarks made with the intent to disrupt a business relationship, if truthful, do not constitute compensable disparagement. In other words, truth is a complete defense.

Using New York as an example, intent can be established if the defendant caused, through inducement, the third party to suspend its commercial relations with the plaintiff. As discussed above, “inducing or otherwise causing” can be “persuasion” or “intimidation”. Informing U.S. allies that security cooperation will be suspended or jeopardized if that ally does business with a particular entity might be viewed as intimidation. However, honest advice or a good-faith warning from one ally to another, might be construed as lacking an intent to disparage, even presuming *arguendo* the claim is unprovable. In evaluating claims, courts will need to evaluate the motivation of the statement alleged to be disparaging, namely that the product or service poses a national security risk. For example, Huawei is viewed as a global leader to such an extent that U.S. officials suggested the U.S. government buy a stake in Ericsson or Nokia to enable the United States to compete with Huawei.¹³³ Potentially, this could militate in favor of finding some degree of “competitive jealousy” – an intent to ruin Huawei’s business prospects although this may also be a reflection of a sincere belief that Huawei does pose a threat to national security.

According to The Restatement (Second) of Torts, courts can evaluate several factors in weighing the question of intent:

the nature of the actor’s conduct; the actor’s motive; the interests of the other with which the actor’s conduct interferes; the interests sought to be advanced by the actor; the social interests in protecting the actor’s freedom of action and the other’s contractual interests; the proximity or remoteness of the actor’s conduct to the interference; and the relations between the parties.¹³⁴

These factors can be applied to a hypothetical involving claims of a national security threat. For example, in the case of a Chinese business, what degree of latitude should be afforded in making the claim that a foreign entity is indeed a threat? Moreover, is it sufficient to demonstrate that the threat exists? Does the

130. *Chicago’s Pizza, Inc. v. Chicago’s Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 863 (Ill. App. Ct. 2008).

131. *See Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (N.Y. 1996).

132. *See* RESTATEMENT (SECOND) OF TORTS § 8A (AM. L. INST. 1965).

133. *See Really? Is the White House Proposing to Buy Ericsson or Nokia?*, N.Y. TIMES (Feb. 7, 2020), <https://perma.cc/V6XK-CT6V> [hereinafter *White House Proposing to Buy Ericsson or Nokia*].

134. RESTATEMENT (SECOND) OF TORTS § 767 (AM. L. INST. 1979).

defendant in such litigation need to prove that the threat was indeed actualized or is the potential to constitute a threat sufficient?

2. Is the Statement True, False or Recklessly Made?

Truth is a defense to disparagement. Can it be demonstrated that Huawei has impinged on national security? The question is complicated because it might be true that Huawei never exercised the potential threat but equally true that the backdoors exist for future exploitation. Do potential threats, if provable, constitute a legitimate security threat? Perhaps the fact that Huawei may put the CCPs interest *uber alles* does indeed constitute a threat although that does not inherently mean Huawei will definitely do so.

Plaintiffs might simply need to present testimony from experts who have reviewed the product or service and can opine that there is no threat. A plaintiff might argue that it is difficult to prove a negative in the national security context or in other words, anything can potentially constitute a threat. Yet, if the defendant can establish the statement was true or was made in good-faith in response to advice sought, this would militate towards a finding of no liability. One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice.¹³⁵

What if an accusing state government claims it cannot reveal the extent of the threat because it would represent a security threat to disclose such information?¹³⁶ What level of threat should be considered adequate to justify the claims and exonerate the accusing government from liability? Current notions of national security may need to adapt to the new paradigm of emerging technologies and strategic conflict. The fact is emerging technologies are based upon scientific advancements in a non-linear scale. Essentially, once dominance is achieved the next development will come faster to the leader.

C. Conceptualizing National Security in a Transformative Era

1. Factors Justifying an Expansion in Conceptualizing National Security

Disparagement claims will likely necessitate evaluating whether a statement alleging the defect of constituting a national security threat is true since truth is an absolute defense. Thus, the evaluation of the legitimate contours of security when a defendant is accused of disparagement necessitates understanding national security's definition. In recent years, the understanding and contours of national security have been expanded. Classically, national security had been ensconced in defense of borders and territorial integrity. However, borders no longer need to be crossed, or territorial integrity infringed upon, to degrade an enemy. Arguably, the

135. *Id.* at § 772.

136. *See* United States v. Reynolds, 345 U.S. 1, 10-12 (1953) (recognition of the state secrets privilege allowing secrecy in order to defend national security).

U.S.-centric financial system and the importance of the U.S. dollar constitute an integral part of U.S. security. As former U.S. Treasury Secretary Mnuchin admitted, the U.S. dollar constitutes “an important alternative for world military conflicts.”¹³⁷ Indeed, adversaries can be “attacked” and degraded by a variety of non-military means such as through cyber-hacking, election fraud, or ideological warfare. Dual-use emerging technologies such as AI and quantum computing also wield enormous military applications.¹³⁸ Moreover, military power is funded by economic prosperity, and dominating emerging technologies can create vast new wealth and structural power. Economic power can be used by states to geo-political advantage; “China makes deliberate use of its economic clout to achieve political goals.”¹³⁹ Allowing an adversary to dominate local markets at the expense of local manufacturers might also be viewed as a security threat. Furthermore, as artificial intelligence is data driven, measures to limit China’s access to data may constitute a legitimate security motivation.

Specifically, with respect to defending U.S. national security, the conceptualization of security has been transformed. No longer relegated to military power, security defense now encompasses defense of technology, which consists of retaining superiority, but also building as large a lead as possible.¹⁴⁰ Thus, while not explicitly stated, U.S. national security implicitly includes depriving a competitor of the means to compete.

On export controls, we have to revisit the longstanding premise of maintaining “relative” advantages over competitors in certain key technologies. We previously maintained a “sliding scale” approach that said we need to stay only a couple of generations ahead. That is not the strategic environment we are in today. Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible . . . This has demonstrated that technology export controls can be more than just a preventative tool.¹⁴¹

Indeed, pursuant to the 2022 export ban on advanced chips and chip-making machines, vanquishing China’s ability to compete constitutes a U.S. national security interest.¹⁴² As both the United States and the European Union believe that

137. Natasha Turak, *U.S. Isn’t Weaponizing the Dollar; Sanctions Are the Alternative to War*, *Mnuchin Says*, CNBC (Dec. 14, 2019), <https://perma.cc/XFU2-86T6>.

138. *Curbs on ASML ‘to Stop Use of Advanced Chips by China Military’*, ASIA FIN. (Feb. 20, 2024), <https://perma.cc/2T3E-N8CQ> (chip restrictions are “aimed to prevent China from using cutting-edge technology to power its military”).

139. See GERMAN NATIONAL SECURITY STRATEGY, *supra* note 5, at 23.

140. For a review of the waves of expansion in terms of conceptualizing security, see Slawotsky, *supra* note 2.

141. Jake Sullivan, Nat’l Sec. Advisor, The White House, Remarks at the Special Competitive Studies Project Global Emerging Technologies Summit (Sept. 16, 2022) [hereinafter Remarks at Special Competitive Studies Project].

142. BUREAU OF INDUS. & SEC., COMMERCE IMPLEMENTS NEW EXPORT CONTROLS ON ADVANCED COMPUTING AND SEMICONDUCTOR MANUFACTURING ITEMS TO THE PEOPLE’S REPUBLIC OF CHINA (PRC) (Oct. 7, 2022), <https://perma.cc/KMP8-Q3ZL>.

economic security requires maintaining “an edge” in critical and emerging dual-use technologies and preventing “technology leakage” to adversaries.¹⁴³

There are additional considerations that play an important role in the understanding of national security. One factor is China’s different approach to domestic governance, rights, and democracy. Empowering a sovereign that does not share U.S. values and seeks to leverage its geo-economic position to export its model may very well be counter to U.S. security interests.

[S]ome states seek to undermine this order and give effect to their revisionist notions of spheres of influence. They view human rights, civil liberties and democratic participation as a threat to their power. As part of hybrid strategies, they are increasingly engaging in targeted attacks on the freedom of other states, and are trying to interfere in political processes, public debate and elections in those states.¹⁴⁴

If China’s influence grows, China’s model will be increasingly popular. As all great powers do, China would like to export its governance model which would lead to more sovereigns incorporating Chinese notions of values and rights which is different than the U.S. model.¹⁴⁵

Another factor is economic security and the centrality it plays in overall national security. Clearly, weaponization of trade and investment is of serious concern.

China under Xi has frequently resorted to offensive measures against ‘misbehaving’ partners, or to economic coercion. Beijing often misuses regulatory instruments, . . . Beyond outright economic coercion, China often threatens retaliation against countries that go against its economic interests, even when they do so in line with international rules.¹⁴⁶

Thus, concerns over China’s potential use of economic coercion may directly implicate the U.S. (and Western) conceptualization of economic security and therefore overall national security. EVs, economic security, software updates and control of networked cars, data sharing, industrial capacity, and surveillance are factors to be considered. Even AI is implicated, as the data collected by these cars

143. See Remarks at Special Competitive Studies Project, *supra* note 141 (“Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible.”); European Commission Press Release IP/24/363, Commission Proposes New Initiatives to Strengthen Economic Security (Jan. 23, 2024), <https://perma.cc/BML9-DTS5> (“European Economic Security Strategy, aiming at maintaining a competitive edge in critical and emerging technologies with the potential to be used for both civil and defence purposes.”).

144. GERMAN NATIONAL SECURITY STRATEGY, *supra* note 5, at 23.

145. Chesterman, *supra* note 29 (“In particular, there does not appear to be a comparable example of a great power (or multiple powers) rising within a normative framework not of its own making, where that normative framework has not undergone substantial change or revolution as a result of the new power’s values and interests.”); see also Fanie Herman, *China’s Party Training Programs in South Africa: A Quest for Political Alignment*, 13 FUDAN J. HUMANITIES & SOC. SCIS. 437, 451 (2020) (discussing Chinese governmental efforts at political training).

146. FRANÇOIS CHIMITS, ET AL, EUROPEAN ECONOMIC SECURITY: CURRENT PRACTICES AND FURTHER DEVELOPMENT 12 (2024), <https://perma.cc/SKX4-YC3P>.

is crucial to AI development. First-mover leadership may prove quite valuable in future EV production. Privacy is of course also implicated.

The dual threat that Chinese electric vehicles pose to Europe's competitiveness and security may be what is finally needed for a real debate about trust and industrial capacity as the EU works to digitalise and decarbonise its economy under conditions of system rivalry. A mere anti-subsidy probe is not going to solve the issue. Europeans will fundamentally have to work out whether they trust Chinese companies to drive the digital and EVs green transition.¹⁴⁷

Highlighting China's vastly expanded notions of security as well as corroborating the risk of EVs is the fact Tesla is partially banned in some areas of China.¹⁴⁸

2. The Slippery Slope of National Security

The expansion in conceptualizing national security and an overly liberal tolerance for disparagement is risky particularly in an era of rising economic nationalism.¹⁴⁹ As industrial capacity, social media, critical tech, data, and emerging technologies are owned by economic actors, nations increasingly recognize the significance of corporations. Even Western market-capitalism sovereigns have recently militated towards incorporating aspects of China's state-centric policies. Such policies seek to harness businesses for promoting strategic objectives like national security, thereby potentially incentivizing overly zealous invocation of security.¹⁵⁰ Rather than addressing a legitimate security concern, perhaps a government is simply protecting redundant and inefficient industries. Improper protectionism has a cost, economic distortion increases consumer costs, discourages innovation, and can block economic development of businesses.

In evaluating disparagement claims, courts will need to strike a balance between the sovereign's right to defend security and the competitor's right to remain free of disparagement. The sovereign should have the right to criticize competitors, if justified, warning about security dangers, thereby providing consumers and other nations with appropriate information. Competitors need the ability to provide fair comparisons and doing so – even at the expense of another actor – serves societal welfare which in cases of national security involve the nation's safety. Fair and truthful comparisons even if accomplished through disparagement can be legitimate.¹⁵¹

However, the specter of exploitation of national security invocation to undermine a competitor is real and may become an important legal issue going forward.

147. See Oertel, *supra* note 97.

148. See Ting-Fang & Tabeta, *supra* note 98; Zhang, *supra* note 39 (China's expansion in understanding security).

149. See Moraes, *supra* note 9, at 126-27 (“[G]overnments have been actively trying to shape economic relations in recent years. They do so by promoting domestic manufacturing or the build-up of domestic industries, by blocking foreign acquisition of assets, and by incentivizing companies to redesign their supply chains.”).

150. *Id.* at 117-18; see also *White House Proposing to Buy Ericsson or Nokia*, *supra* note 133.

151. See Perlman, *supra* note 50, at 62 (“offering someone a better deal may interfere with an existing contract, but it also is the essence of a competitive market”).

Whether the claim is correct requires an examination of the understanding of security. Furthermore, the trend towards economic nationalism is intensifying. In sum, courts will need to strike a balance between the government's obligation to defend the national bastion and the right of the foreign economic actor to remain free of disparagement.

In the new era of great power competition, economic actors are crucial to national security and economic vitality. As a result, states have an increasing interest in harnessing corporate economic power, particularly businesses involved in critical technologies, important product inputs, data, media, and emerging technologies. These industries are correlated with the overall hegemonic competition. Both the United States and China are increasingly conscious of the vital importance of cross-border investment, trade, and their national corporations. As an inherent corollary, both the United States and China are incentivized to engage in conduct tainting the other, which may encompass commercial disparagement in the guise of protecting national security.

VI. CONCLUSION

In the era of intensive economic competition, the potential for disparagement is real and could encompass accusations of an economic actor's product or service constituting a national security threat, i.e., the product or service is defective. Accusing business entities of posing a national security risk potentially damages prospective contractual relations because the reputation of a business and its products is of vital import. To falsely (or with reckless disregard) assert negative attributes might constitute economic disparagement.

However, competitors are allowed to make fair claims and true statements about a competitor's products or services. If the accusations are true or made in good faith, the claim of disparagement is greatly weakened or defeated. Therefore, it is crucial to examine whether the claim of a national security threat is legitimate, contrived, or recklessly asserted. Doing so tasks courts with examining intent and its inter-connection to the concept of national security. Of course, given the expanding understanding of national security threats sovereigns must be allowed to fulfill their ultimate priority: securing the national homeland and protecting the population.

Economic tort claims may serve as a viable pathway to challenge national security-based measures. The principle of compensation for economic relations adversely impacted by intentionally false statements is widely recognized in U.S. law. In U.S. Federal or at the individual state level, governmental measures intended to disturb a foreign plaintiff's business interests in principle should be cognizable pursuant to general principles of economic tort theory. However, immunity presents a daunting if not impossible hurdle with respect to claims against the federal government. Suits against states may be more palatable. In theory, such claims might serve as a viable conduit to balance the concern that national security is involved for protectionist reasons. As global economic actors will likely need to deal with increasingly competitive pressures and potential tortious interference with contracts, claims alleging commercial disparagement may become an important part of litigating measures based upon alleged national security threats.